Enterprise Corrugated Container Corp. *and* International Brotherhood of Teamsters, Local 560. Case 22–CA–26872

January 10, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on April 22, 2005, the Acting General Counsel issued the complaint on August 11, 2005, against Enterprise Corrugated Container Corp., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the Act. The Respondent failed to file an answer.

On September 22, 2005, the Acting General Counsel filed a Motion for Default Judgment and Memorandum in Support with the Board. On September 26, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that unless an answer was filed by August 25, 2005, all the allegations in the complaint would be found to be true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated September 2, 2005, notified the Respondent that unless an answer was received by September 9, 2005, a motion for default judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the Acting General Counsel's motion for default judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Saddle Brook, New Jersey, has been engaged in the manufacture, distribution, and sale of packaging materials.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, sold and shipped from its Saddle Brook, New Jersey facility goods and materials valued in excess of $50,000 directly to points outside the state of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, Local 560, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the drivers' unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

> All full-time and regular part-time drivers employed by the Respondent at its Saddle Brook, New Jersey facility.

The Union has been the designated exclusive collective-bargaining representative of the drivers' unit and has been recognized as such by the Respondent. This recognition has been embodied in the most recent collective-bargaining agreement, effective from April 1, 2003, through March 31, 2006.

At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the drivers' unit.

Since about March 2005, and by letter of April 1, 2005, the Union requested that the Respondent furnish the Union with information concerning the sale of the Respondent's business.

The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining agent of the drivers' unit.

Since March 2005, and at all material times, the Respondent has failed and refused to furnish the Union with the information requested by it.

About March 2005, and by letter of April 1, 2005, the Union requested that the Respondent bargain collectively about the effects of the Respondent's decision to close its business.

Since about March 2005, and at all material times, the Respondent has failed and refused to bargain about the effects of its decision to close its business.

The subject set forth above relates to the wages, hours, and other terms and conditions of employment of the drivers' unit and is a mandatory subject for the purposes of collective bargaining.

CONCLUSIONS OF LAW

1. By failing and refusing to provide the Union with requested information concerning the sale of its business, and by failing and refusing to bargain with the Union

about the effects of its decision to close its business, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

2. Our dissenting colleague would deny the Acting General Counsel's motion for default judgment with respect to the allegation that the Respondent failed to provide the Union with requested information concerning the sale of the Respondent's business. In the dissent's view, because the complaint did not detail the information requested and, further, because not all information relating to business sales, generally, is presumptively relevant, the Acting General Counsel's pleading fails. We disagree.

3. The complaint, which the Respondent failed to answer, includes the express allegation that the requested information regarding the Respondent's business sale was "necessary for and relevant to the Union's performance of its duties as the exclusive bargaining agent of the driver's unit." By failing to answer the complaint, the Respondent admits this allegation. As we have previously held, "[t]he Respondent's admission of the relevance of the requested information is sufficient to support an unfair labor practice finding." *TNT Logistics of North America*, 344 NLRB 489 fn. 3 (2005). See also, *Artesia Ready Mix Concrete*, 339 NLRB 1224, 1226–1227 (2003); *Mid-America Gunite*, 345 NLRB 1119, 1120 (2005). Accordingly, it is appropriate to grant the Acting General Counsel's motion for default judgment on this information allegation.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) and (5) by failing and refusing since March 2005 to furnish the Union with the information it requested concerning the sale of the Respondent's business, which is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the drivers' unit, we shall order the Respondent to furnish the Union with the requested information.

In addition, to remedy the Respondent's unlawful failure and refusal to bargain in good faith with the Union concerning the effects of the Respondent's decision to close its business, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. Because of the Respondent's unlawful conduct, however, the drivers' unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to re-create in some practicable manner a situation in which the parties' bargaining positions are not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the drivers' unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified in *Melody Toyota,* 325 NLRB 846 (1998).[1]

Thus, the Respondent shall pay its drivers' unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the closure of its business on the drivers' unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent closed its business to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of

[1] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990). The complaint and motion do not specify whether the Respondent implemented its decision to close its business or laid off the drivers' unit employees. Thus, we do not know whether, or to what extent, the refusal to bargain about effects had an impact on the drivers' unit employees. In these circumstances, we shall permit the Respondent to contest the appropriateness of a *Transmarine* backpay remedy at the compliance stage. See, e.g., *Fabricating Engineers, Inc.,* 341 NLRB 10, 11 fn. 1 (2004); *Corbin, Ltd.*, 340 NLRB 1001,1002 fn. 2 (2003).

their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the drivers' unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, in view of the fact that the Respondent's business has apparently closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of the drivers' unit employees who were employed by the Respondent when it closed or announced the closure of its business, in order to inform them of the outcome of this proceeding.

ORDER

The National Labor Relations Board orders that the Respondent, Enterprise Corrugated Container Corp., Saddle Brook, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to furnish the International Brotherhood of Teamsters, Local 560 with information necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit. The unit is:

> All full-time and regular part-time drivers employed by the Respondent at its Saddle Brook, New Jersey facility.

(b) Failing and refusing to bargain collectively and in good faith with the Union about the effects on the drivers' unit employees of its decision to close its business.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish the Union with the information it has requested since about March 2005, and by letter of April 1, 2005, concerning the sale of the Respondent's business.

(b) On request, bargain with the Union concerning the effects on the drivers' unit employees of the Respondent's decision to close its business, and reduce to writing and sign any agreement reached as a result of such bargaining.

(c) Pay the drivers' unit employees their normal wages for the period set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of the attached notice marked "Appendix"[2] to the Union and to all drivers' unit employees who were employed by the Respondent when it closed or announced the closure of its business.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, dissenting in part.

An employer is required to provide a union with information necessary and relevant to the union's performance of its duties as the exclusive collective-bargaining representative. Failure to provide such information when requested is a violation of Section 8(a)(5). In this case, the complaint alleges that the union requested information "concerning the sale of Respondent's business." However, not all information concerning the sale of a business is presumptively relevant. See *Sierra International Trucks, Inc*., 319 NLRB 948, 950–951 (1995). If any portion of the information is not presumptively relevant, the Union must first demonstrate its relevance to the employer before a disclosure obligation is triggered. Allegations to this effect must be set forth in a complaint.

"[A] default judgment is unassailable on the merits, only so far as it is supported by well-pleaded allegations assumed to be true." *Nishimatsu Construction Co. v. Houston National Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), citing *Thomson v. Wooster*, 114 U.S. 104 (1885). Since in this case the complaint failed to allege facts sufficient to establish the presumptive relevance of the requested information or that its relevance was demonstrated by the Union to the Respondent, I find that the complaint is not well pled and is insufficient to support a default judgment on this allegation.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

My colleagues in the majority find as sufficient the summary allegation of the complaint that the requested information was "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining agent . . . ." They conclude that by not answering the complaint, the Respondent has admitted the relevance of the information. In my view, however, where the specific information identified in the complaint as having been requested by the Union is not all presumptively relevant, a summary allegation that it is "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining agent . . ." fails to satisfy due process standards. Again, information relating to the sale of a business is not necessarily presumptively relevant and for any information that is not presumptively relevant, a demonstration of its relevance must have been made. Consequently, consistent with the Supreme Court's decision in *Thomson v. Wooster,* supra, I believe the complaint is not well pled and insufficient to support entry of a default judgment on this allegation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to furnish the International Brotherhood of Teamsters, Local 560, with information necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit. The unit is:

All full-time and regular part-time drivers employed by us at our Saddle Brook, New Jersey facility.

WE WILL NOT fail and refuse to bargain collectively and in good faith with the Union about the effects of our decision to close our business.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL furnish the Union with the information it has requested since about March 2005, and by letter of April 1, 2005, concerning the sale of our business.

WE WILL, on request, bargain with the Union concerning the effects on the drivers' unit employees of our decision to close our business and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay limited backpay to drivers' unit employees in connection with our failure to bargain with the Union over the effects of our decision to close our business, with interest.

ENTERPRISE CORRUGATED CONTAINER CORP.